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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979.

No. 79-899

GEORGE BANTA COMPANY, INC.,
BANTA DIVISION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Petitioner, George Banta Company, Inc., Banta Division, petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on August 6, 1979.

OPINIONS BELOW.

The opinion of the Court of Appeals, including the dissenting opinion, and the denial of rehearing and rehearing *en banc* are reported at 604 F. 2d 830 and are reproduced herein as Appendices A and B, respectively. The order of the National Labor Relations Board is reported at 236 NLRB No. 224 and is reproduced herein as Appendix C.

JURISDICTION.

The opinion and judgment of the Court of Appeals was entered on August 6, 1979. A timely-filed petition for rehearing and suggestion for rehearing *en banc* was denied on September 14, 1979. This Court's jurisdiction is invoked under 28 U. S. C § 1254(1).

QUESTIONS PRESENTED.

Whether a party to an NLRB formal settlement agreement which is contingent on Board approval can withdraw from the settlement agreement prior to Board approval.

Whether a party to a formal settlement agreement requiring Board approval which purportedly settles an issue can withdraw from the agreement prior to Board approval when the NLRB issues a complaint in which the very same issue is alleged as a violation of the National Labor Relations Act and subsequently orders that this issue be litigated.

Whether a party to a formal settlement agreement which requires Board approval can, in the context of a continuing strike by its employees, withdraw from said agreement when the NLRB fails to approve the agreement with reasonable dispatch.

STATUTES AND REGULATIONS INVOLVED.

The following section of the Administrative Procedure Act (A. P. A.), 5 U. S. C. § 500 *et seq.*, is applicable and is appended verbatim: § 706. Section 101.9 of the National Labor Relations Board's Statements of Procedure, 29 C. F. R. § 101.9, is applicable to this case and is appended verbatim. Section 102.51 of the National Labor Relations Board's Rules and Regulations, Title 29, Chapter 1, Subpart c, 29 C. F. R. § 102.51, is also applicable to this case and is appended verbatim. Also involved and appended verbatim are relevant portions of the following sections of the National Labor Relations Board's Case Handling Manual (Part One)—Unfair Labor Practice Proceedings: § 10140, § 10146, § 10148, § 10150, § 10152, § 10154, § 10156, § 10164, § 10166, § 10168, § 10172, § 10174. The relevant statutory and regulatory provisions are set forth in the appendix attached as Appendix D and Appendix E.

STATEMENT OF THE CASE.

Following the filing of various unfair labor practice charges by the Graphic Arts International Union (GAIU) in February, March and April, 1977, the Regional Director for Region Thirty of the NLRB in late June, 1977 issued a complaint alleging that the Company's action in implementing its last contract offer on April 4, 1977, constituted an unfair labor practice (herein referred to as "Banta I"). Thereafter, following settlement discussions with Region Thirty, the Company in July 1977 executed a formal settlement agreement which contained a non-admission clause. As required by the NLRB policy,[1] the Company was informed by Board agents at the time it executed the

1. Section 10172.3 of the *NLRB Case Handling Manual* provides that "[t]he Board agent negotiating the settlement should make clear that the settlement not only is subject to approval by the Board, but also is subject to approval by the General Counsel's office in Washington."

settlement agreement that the agreement would not be binding until it had been approved by the Regional Director, the General Counsel of the NLRB, *and* the NLRB itself.

Despite the continuation of a strike by the GAIU, the settlement agreement was not approved by the Regional Director until August 11, 1977, and by the General Counsel until September 22, 1977. During this time, the Company repeatedly informed representatives of both the Regional Director and the NLRB General Counsel that the delays in obtaining the various approvals were creating many problems for the Company in the context of the ongoing strike and that unless the approval process could be speeded up, the Company might well be forced to withdraw from the settlement stipulation. At no time was the Company advised by the NLRB that it could not withdraw from the settlement agreement prior to Board approval.

Following the conclusion of negotiations in October 1977, the GAIU filed new unfair labor practice charges on October 20 (herein referred to as "Banta II"). Five days later on October 25, 1977, the Company withdrew in writing its offer of settlement because the new unfair labor practice charges raised issues that were identical to those purportedly resolved by the settlement agreement and because of the continuing failure of the NLRB to approve the agreement.

On March 8, 1977, the Regional Director issued a complaint with respect to the unfair labor practice charges filed in Banta II. This complaint alleged that the Company's implementation of its "last contract offer" on April 4, 1977 constituted an unfair labor practice and, as a result, the strike was an unfair labor practice strike. This is the *same* violation that was alleged in the complaint in Banta I which was the subject of the settlement agreement.

On July 14, 1978, almost a full year after the Company executed the settlement agreement, the NLRB issued its decision and order approving the settlement agreement and denying the Company's right to withdraw from the agreement.

Despite strenuous efforts by the Company to resist litigation of whether the Company's implementation of its "last contract offer" was an unfair labor practice during the hearing in Banta II in August and September, 1978, the NLRB, acting on a special interim appeal, ordered that this issue be litigated before the Administrative Law Judge. Nearly three weeks of testimony was taken thereafter on the issue of whether the Company's implementation of its last economic offer on April 4, 1977 constituted an unfair labor practice.

On appeal, the Fourth Circuit upheld the Board's order denying the Company's right to withdraw from the formal settlement agreement prior to Board approval. Judge Bryan dissented, stating that the majority failed "to recognize that General Counsel, rather than Banta (the Company), abrogated the Settlement Stipulation (the contract) in substantial and material points, justifying Banta's disaffirmance and termination of the agreement."

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI.

WHETHER, AND UNDER WHAT CIRCUMSTANCES, A PARTY TO A FORMAL NLRB SETTLEMENT AGREEMENT CAN WITHDRAW FROM SUCH AN AGREEMENT PRIOR TO NLRB APPROVAL IS AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A.

This Court has addressed the question of NLRB settlement agreements on only one prior occasion. Twenty-five years ago in *Wallace Corporation* v. *NLRB*, 323 U. S. 248 (1945), this Court held that the NLRB had the authority to go "behind [settlement] agreements . . . where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose, or where there has been a subsequent unfair labor practice." *Id.* at 241. The Court further noted in upholding the Board's right, in effect, to withdraw from a settle-

ment agreement that this "is appropriate to accomplish the Act's purpose with fairness to all concerned." *Id.* Thus, while this Court has addressed the question of the Board's right to withdraw or go behind a settlement agreement, it has not addressed the equally important issue of the right of a party other than the Board to withdraw from an NLRB settlement agreement.

B.

The NLRB's Statements of Procedure provide for two types of settlement agreements, *i.e.*, informal settlement agreements and formal settlement agreements. An informal settlement agreement is not subject to Board approval and does not become the subject of a Board order, but rather must be approved by the Regional Director or, in some instances, by an Administrative Law Judge. NLRB Statements of Procedure, 29 C. F. R. §§ 101.9(b)(2) & (d)(1); *NLRB* v. *All Brand Printing Corp.*, 594 F. 2d 926, 929 (2d Cir. 1979). On the other hand, a formal settlement agreement requires, in addition to the Regional Director's approval, the approval of the General Counsel, and the Board. Moreover, a formal settlement agreement ordinarily provides for the consent entry of a court judgment enforcing the order. NLRB Statements of Procedure, 29 C. F. R. § 101.9 (b)(1). Despite these differences, the NLRB in its *Case Handling Manual* notes that both a formal and informal settlement agreement constitute "an agreement on which the Board has placed its imprimatur. . . ." § 10140.1, *NLRB Case Handling Manual* (1979). As the D. C. Circuit observed in *ILGWU* v. *NLRB*, 501 F. 2d 823, 830 (D. C. Cir. 1974), "[t]here is . . . substantial similarity between a 'formal' and an 'informal' settlement" and "[t]he substantive elements of the formal and informal settlement are essentially identical. . . ." *See also NLRB* v. *All Brand Printing Corp., supra* at 930-31.

A party to an informal settlement agreement can withdraw from the agreement by merely refusing to abide by its terms,

even though all of the necessary parties to the agreement have given their approval. Thus, Section 10154 of the NLRB *Case Handling Manual* provides that if the provisions of the informal settlement agreement "have not or will not be carried out, . . . appropriate action will be taken; complaint will be issued or reissued, and pressed on its merits. . . ." *See also* NLRB Statements of Procedure, 29 C. F. R. § 101.9(e)(2). It is obvious, therefore, that a party to an NLRB informal settlement agreement can withdraw its agreement either before or after the agreement's approval by the Regional Director and thereby be assured of a hearing on the merits as to whether it committed an unfair labor practice.

Despite the fact that a party to an informal settlement agreement has the absolute right to withdraw from such an agreement at any time and get a hearing on the merits, the Fourth Circuit in upholding the Board's order held that a party to a formal settlement agreement does not have the right to withdraw from a formal settlement agreement prior to the required Board approval. The Fourth Circuit based its decision on what it perceived to be the "distinct roles of the Board and the General Counsel in the settlement process." Based on this perceived distinction, the Fourth Circuit concluded that once the General Counsel approved the formal settlement agreement in his prosecutorial capacity, it was binding on the Company and, as a result, the Company could not thereafter withdraw even though the Board had not yet approved the agreement. This conclusion is not only arbitrary but in direct conflict with the views of the D. C. Circuit as to the nature of the role played by the General Counsel with respect to settlement agreements.

In *ILGWU* v. *NLRB*, 501 F. 2d 823 (D. C. Cir. 1974), the D. C. Circuit, after observing that the "substantive elements of the formal and informal settlement are essentially identical," concluded that "after a complaint has issued and the administrative process initiated, certain actions which broadly conceived might be characterized as 'prosecutorial' assume essentially ad-

judicatory attributes." *Id.* at 831. As a result, the D. C. Circuit rejected the NLRB's contention that the court did not have jurisdiction to review the withdrawal of a complaint following an informal settlement agreement on the ground that the action of the General Counsel was prosecutorial and therefor not subject to judicial review.

Particularly relevant to the instant case is the D. C. Circuit's recognition that it is the General Counsel who determines whether the settlement is to be formal or informal:

> "It is arguable, of course, that the power of the General Counsel to choose the mode of settlement without minimal standards in either the Act or the Board's regulations and concomitantly delineate the jurisdictional parameters of the Courts of Appeals itself would be intrinsically arbitrary, except that it may be saved by the power of the courts to review both the choice and the ensuing result in order to guard against arbitrary and capricious action." *Id.* at 830, n. 27.

The issue in the instant case is analogous in that the choice of the General Counsel in choosing a formal settlement over an informal settlement directly determined whether the Petitioner could withdraw from the settlement agreement. The Petitioner submits that it is, to quote the District of Columbia Circuit in *ILGWU* v. *NLRB, supra,* "intrinsically arbitrary" for the NLRB and the Fourth Circuit to hold that a party to a formal settlement agreement cannot withdraw from the agreement prior to Board approval when it is clear that a party to an informal settlement agreement may withdraw from the agreement even after it has been executed by all parties.[2]

To support its decision denying the Company's right to withdraw from the formal settlement agreement prior to Board approval, the Fourth Circuit stated that "[t]o permit a respondent unilaterally to withdraw from a formally executed settlement stipulation prior to Board approval would undermine the continued efficacy of the settlement process. . . ." 604 F. 2d at 635-36. That this contention is totally without merit is crystal clear from an examination of the records maintained by the NLRB. As previously discussed, the NLRB's settlement process includes both informal and formal settlements. For the fiscal year ending September 30, 1978,[3] the NLRB reported that a total of 9,232 cases were closed by agreement of the parties. Of that number, 9,060, or 98.1% of the total, were by informal settlement. Only 172 were disposed of by formal settlement agreements! In other words, less than 2% of all of the unfair labor practice cases disposed of during the last fiscal year for which statistics are available were disposed of by formal settlement agreements. *Forty-Third Annual Report of the NLRB* 254 (1979). Since a party to an informal settlement agreement has the unrestricted and absolute right to withdraw even after it has been executed by the Board acting through the Regional Director, it can hardly be maintained that extending the right to withdraw from a formal settlement agreement *prior to Board approval* undermines the Board's settlement process. Stated differently, if the withdrawal from an informal settlement agreement after the approval of all necessary parties does not undermine the settlement process, then *a fortiori* the withdrawal of a party from a formal settlement agreement *prior to Board approval* does not adversely affect the Board's settlement process.

2. Parenthetically, it should be noted that the Petitioner is not contending that a party to a formal settlement agreement should have the right to withdraw *after* Board approval, even though such an absolute right exists with respect to informal settlement agreements.

C.

The arbitrary nature of the decision to deny the Petitioner the right to withdraw from the formal settlement agreement prior to Board approval is compounded beyond belief when the actual circumstances surrounding the withdrawal are taken into account.

3. This, of course, is the same fiscal year in which the NLRB approved the settlement agreement at issue herein.

The pivotal issue purportedly put to rest by the settlement agreement executed by the Company in Banta I was whether the Company's implementation of its "last contract offer" on April 4, 1977 constituted an unfair labor practice. Yet, it is this very *same* issue which is at the crux of the complaint that the Board issued in Banta II. Although the Company vigorously contended that this issue could not be litigated in Banta II since it was clearly encompassed by the settlement agreement in Banta I, the NLRB, following a direct appeal from a ruling of the Administrative Law Judge, directed that this issue be fully litigated. Thereafter, an extensive evidentiary hearing was held before an Administrative Law Judge at which testimony and exhibits were introduced as to whether the Company's implementation of its "last economic offer" was an unfair labor practice. Simply put, it is the Petitioner's position that the NLRB, after ordering that the issue which was purportedly settled in Banta I be fully litigated in Banta II, cannot thereafter deny the Company's right to withdraw from the settlement agreement. The NLRB not only went behind the settlement agreement, but it, in effect, withdrew from the settlement agreement by choosing to litigate the very issue that was the subject of the settlement agreement. Having done so, it is totally arbitrary and unjust for the Board and the Fourth Circuit to deny the Company's right to withdraw from the settlement agreement.[4]

While the facts in the instant case do not necessarily fall within the commonly understood parameters of such doctrines as collateral estoppel, election of remedies, or *res judicata,* it is nevertheless clear that elements of each of these doctrines are involved as a result of the NLRB's conscious decision to litigate in Banta II the *same* pivotal issue which was purportedly put to rest by

4. The Fourth Circuit's effort to characterize Banta I as relating to pre-strike violations and Banta II as relating to post-strike violations completely misses the point. The alleged violations in Banta II are directly premised on the *same* alleged pre-strike violation that was purportedly resolved by the settlement agreement in Banta I, *i.e.,* the alleged implementation of "last contract offer" short of true bargaining impasse.

the settlement agreement in Banta I. With federal administrative bodies playing an ever-increasing role in regulating our national economy, it is important that they be governed by elemental notions of fair play and subject to the scope of review intended by Section 706(2)(A) of the Administrative Procedure Act. This case presents an excellent vehicle for this Court to deal with this important issue.

The arbitrary nature of the NLRB's refusal to let the Company withdraw from the settlement agreement prior to Board approval is further compounded by the Board's delay in approving the agreement. Indeed, it was on this very point that Judge Bryan dissented from the majority decision by the Fourth Circuit, stating:

> "Since the Company had been embroiled in the throes of a strike for over three months, plainly, prompt resolution of the problem was the inducement of Banta's ready joinder in the [settlement]. . . .
>
> "The Company faithfully and regularly, but in vain, reminded General Counsel that the strike was still afoot and the lagging pace was creating grave problems. Indeed, . . . the Company had protested . . . that further delays would require it to withdraw from the stipulation."

When all of the circumstances surrounding the Company's request to withdraw from the settlement agreement are taken into account, it becomes patently clear that the Board's refusal to permit the Company to withdraw is, in the words of Section 706(2)(A) of the Administrative Procedure Act, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. § 706(2)(A). Just as this Court granted a writ of certiorari in *Wallace Corporation* v. *NLRB, supra,* in order to set forth the rights of the NLRB to withdraw from a settlement agreement "where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose," *id.* at 241, it should take this opportunity to set forth

the rights of a respondent such as Petitioner to withdraw from a settlement agreement "where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose. . . ." *Id.* The Board by consciously choosing to litigate the very issue purportedly resolved in Banta I has, by its own action, "demonstrated that efforts at adjustment have failed to accomplish their purpose. . . ." *Id.*

CONCLUSION.

Since the purposes served by both formal and informal settlement agreements are the same, since the courts have held that the appeal rights are essentially the same, and since more than 98% of all settlement agreements are informal rather than formal, then it should logically follow that a party to a formal settlement agreement should at the very least have the right to withdraw from such an agreement prior to Board approval. To extend such a withdrawal right to a party to an informal settlement agreement and deny the right to withdraw prior to Board approval with respect to a formal settlement agreement is plainly arbitrary, especially when the right to withdraw exists with respect to more than 98% of all settlement agreements entered into by the Board. To deny the right to withdraw prior to Board approval in the less than 2% of the cases in which the General Counsel chooses a formal settlement agreement is a patent abuse of discretion. This abuse is even clearer in light of the Board's conscious decision to litigate in Banta II the very issue purportedly put to rest by the settlement agreement in Banta I and in light of the long delay by the Board in acting on the settlement agreement. Accordingly, it is respectfully requested that this Court grant this petition for a writ of certiorari, in order to answer an important question with respect to the proper administration of the National Labor Relations Act.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 78-1437

George Banta Company, Inc., Banta Division,
Petitioner,

v.

National Labor Relations Board,
Respondent.

On Petition to Review and Cross-Application for Summary Entry of a Judgment Enforcing an Order of the National Labor Relations Board upon Stipulation of the Parties for Consent Judgment.

Argued: April 6, 1979 Decided: August 6, 1979

Before BRYAN, *Senior Circuit Judge,* HALL, *Circuit Judge,* and MACKENZIE,* *District Judge.*

Michael J. Rybicki (R. Theodore Clark, Jr., Jeffrey L. Madoff, Grant E. Morris, Seyfarth, Shaw, Fairweather & Geraldson on brief) for Petitioner; Christopher W. Katzenbach, NLRB (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, John D. Burgoyne, Assistant General Counsel, NLRB on brief)

* Honorable John A. MacKenzie, United States District Judge for the Eastern District of Virginia, at Norfolk, sitting by designation.

for Respondent; (Irving M. King, Thomas D. Allison, Peggy A. Hillman, Cotton, Watt, Jones, King & Bowlus on brief) for Intervenor.

HALL, *Circuit Judge:*

Petitioner George Banta Company, Inc. [Banta] seeks review of a National Labor Relations Board order enforcing a formal settlement stipulation signed by Banta, the union representing its employees, and the NLRB General Counsel. The Board approved the settlement, and issued its order, following its rejection of Banta's attempt to withdraw from the agreement. In seeking to set aside the order, Banta contends that it had an absolute right to withdraw at any time prior to the Board's approval of the settlement or, alternatively, that its withdrawal was justified by changed circumstances and Board delay. We find no merit to these contentions and, accordingly, grant the Board's cross-petition for enforcement of the order.

I.

Banta is engaged in the printing business and maintains two production facilities in Menasha, Wisconsin. Two groups of employees at these facilities, bindery and lithographic workers, are represented by the Graphic Arts International Union, AFL-CIO, CLC. In February, 1977, Banta and the Union began negotiations for a new collective bargaining agreement, to replace the existing one which was due to expire April 4, 1977. Negotiations continued until April 4, 1977, when Banta announced that it was immediately implementing its "last contract offer", including provisions for lengthening the work week and limiting employer contributions to a health insurance plan. On the same day, the Union membership voted not to work under the company's unilaterally imposed terms, and began a strike.

The Union subsequently accused the company of unfair labor practices, resulting in a complaint filed by the NLRB Regional

Director on June 27, 1977. The complaint charged Banta with violating §§ 8(a)(5) and 8(a)(1) of the National Labor Relations Act, 29 U. S. C. §§ 158(a)(5) and 158(a)(1), by unilaterally changing wages, hours of work and other terms of employment, at a time when negotiations between the parties were continuing and when no bargaining impasse had occurred. It also characterized the resulting strike as an unfair labor practices strike.[1] A hearing on the complaint was scheduled for July 11, 1977. In addition, the Regional Director was granted Board authorization under § 10(j) of the Act, 29 U. S. C. § 160 (j), to seek injunctive relief in district court to require recission of the alleged unfair labor practices pending resolution of the charge.

The scheduled hearing was never held, and the authorized injunctive relief against the company was never sought. Instead, Banta entered into settlement negotiations with the NLRB Regional Director, and on July 22, 1977, the company signed a settlement stipulation. The company agreed in the settlement, *inter alia,* to revoke implementation of its "last contract offer" of April 4, 1977, and to "revert to the wages, hours of work and other terms and conditions of employment which existed prior thereto, but excluding cost-of-living adjustments, arbitration procedure and union security." The stipulation contains a non-admission clause, and does not expressly state that the strike was the result of unfair labor practices by the company. However, the agreement includes a statement of the striking employees'

1. "Unfair labor practice strikers" are entitled to immediate and nondiscriminatory reinstatement upon their unconditional offer to return to work, even if such reinstatement requires dismissal of replacements who have been hired to fill their jobs during the strike. An employer may refuse to reinstate "economic strikers" if the positions they left during the strike have been filled, although he may not discriminate on the basis of relative union activity when filling vacancies which remain when the strike is over. *E.g., NLRB* v. *Mackay Radio & Tel. Co.,* 304 U. S. 333 (1938); *NLRB* v. *Southland Cork Co.,* 342 F. 2d 702 (4th Cir. 1965).

reinstatement rights, which coincide precisely with those of unfair labor practice strikers.[2]

The agreement provides that "[u]pon this Stipulation . . . and without any further notice of proceedings herein, the Board may enter an order forthwith" based upon the terms of the stipulation, and the company waives all defenses to judicial enforcement of the order. Finally, the document states that the "Stipulation is subject to the approval of the Board, and it shall be of no force and effect until the Board has granted such approval. Upon the Board's approval of the Stipulation, the Respondent [Banta] will immediately comply with the provisions of the order."

On August 5, 1977, the Union formally objected to the terms of the settlement, particularly its failure to provide for the cost-of-living adjustments which had been part of the collective bargaining agreement which expired on April 3, and requested a hearing.[3] The Regional Director rejected the Union's arguments, and its hearing request, finding that the stipulation "appears to remedy the violations found" and that "a hearing will unnecessarily delay . . . the remedy." On August 12, he signed the stipulation and submitted it to the NLRB General Counsel for approval.

2. In a letter responding to concerns expressed by the Union, the Regional Director stated that "[t]he provisions of . . . the Settlement, in effect, provide that the strikers are unfair labor practice strikers until the notice posting period expires."

3. The Board's Statement of Procedures provides certain rights to a charging party who objects to a proposed settlement:

> (c)(1) If after issuance of complaint but before opening of the hearing, the charging party will not join in a settlement tentatively agreed upon by the regional director, the respondent, and any other parties whose consent may be required, the regional director serves a copy of the proposed settlement agreement on the charging party with a brief written statement of the reasons for proposing its approval. Within 5 days after service of these documents, the charging party may file with the regional director a written statement of any objections to the proposed settlement. Such objections will be considered by the regional director in determining whether to approve the proposed settlement. If the settlement is approved by the regional director notwithstanding the objections, the charging party is so informed and provided a brief written statement of the reasons for the approval.
>
> (2) If the settlement agreement approved by the regional director is a formal one, providing for the entry of a Board

(Footnote 3 continued on next page.)

The Union renewed its objections to the agreement, and on August 30, 1977, Union representatives met with members of the General Counsel's staff in Washington to discuss the objections. On September 20, the General Counsel notified the Union that, while the Union's right to continuing cost-of-living adjustments presented a "difficult and complex legal issue", he had signed the stipulation and had forwarded it to the Board with his recommendation that it be approved. The Union was given until October 5 to file its objections with the Board, and this deadline was subsequently extended to October 17 because of a substitution in the Union's counsel. In a telegram dated October 4, Banta strenuously objected to this time extension, stating:

(Footnote 3 continued.)

> order, the settlement agreement together with the charging party's objections and the regional director's written statements, are submitted to Washington, D. C., where they are reviewed by the general counsel. If the general counsel decides to approve the settlement agreement, he shall so inform the charging party and submit the agreement and accompanying documents to the Board, upon whose approval the settlement is contingent. Within 7 days after service of notice of submission of the settlement agreement to the Board, the charging party may file with the Board in Washington, D. C., a further statement in support of his objections to the settlement agreement. 29 C. F. R. § 101.9.

In addition, the charging party may be entitled to a hearing on his objections to the settlement. *Compare Marine Engineers Beneficial Association* v. *NLRB*, 202 F. 2d 546 (3d Cir.), *cert. denied*, 346 U. S. 819 (1953) (charging party is always entitled to a hearing on its objections to a settlement once a complaint has issued) *with Concrete Materials of Georgia, Inc.* v. *NLRB*, 440 F. 2d 61 (5th Cir. 1971) (charging party entitled to an evidentiary hearing on any material issues of disputed fact presented by the objections). *Contra, Local 282, International Brotherhood of Teamsters* v. *NLRB*, 339 F. 2d 795 (2d Cir. 1964) (charging party has no right to a hearing on its objections).

> Because of the tremendous delays that have occurred already in the processing of this formal settlement which was initially signed by Banta Division in early July, any further delay would cause irreparable harm, especially since the strike which commenced on April 4 is still in progress. Banta Division therefore requests that the requested extension be denied and/or revoked and that the Board expeditiously act on the formal settlement agreement that has already been recommended and approved by both the Regional Director and the General Counsel.

While the settlement agreement was thus progressing toward final Board approval, collective bargaining negotiations between Banta and the Union had resumed. On September 7, 1977, the company notified the Union that it was partially implementing the terms of the settlement stipulation. In a notice utilizing the exact language of the stipulation, Banta revoked implementation of its April 4 "last contract offer" and reverted to the previous conditions of employment as specified in the stipulation.

On October 8, 1977, following meetings at which the provisions of the settlement stipulation were explained to the Union membership, the Union signed the stipulation. The Union notified Banta that it had now joined in the settlement agreement and, in the same letter, accepted Banta's most recent contract proposal, reserving the right to challenge the proposal's reinstatement plan as not complying with the settlement stipulation or the relevant law. Banta accepted the striking employees' unconditional offer to return to work and immediately resumed production operations.

On October 20, 1977, the Union filed new unfair labor practice charges against Banta [*Banta II*], accusing the company of violating both the National Labor Relations Act and the terms of the settlement stipulation by massive discrimination against returning employees who had participated in the strike. Five days later, Banta notified the Board that "in light of the great delay in approving Settlement . . . and due to new issues relative to the Settlement raised in [*Banta II*], effective immediately the Employer withdraws its offer of Settlement."

Following extensive arguments by all parties, the Board, on July 14, 1978, refused to permit the company to withdraw from the stipulation and entered its order enforcing the agreement's terms. 236 NLRB 224 (1978).

Banta now petitions this court to set aside the Board's order, on the grounds that its October 25, 1977, letter to the Board effectively nullified its consent to the agreement. The Board cross--petitions for enforcement of the order, which it characterizes as a valid consent order.[4] The sole issue presented in our review of the order is whether the Board properly rejected Banta's attempted withdrawal from the settlement stipulation.

II.

Banta contends that, under both general contract law principles and the Board's own procedural rules, a party has an absolute right to withdraw from a settlement stipulation at any point prior to the agreement's approval by the Board. We see no merit to this contention.

Neither the Board's procedural rules nor any of its prior cases address the issue of the right to withdraw from a formal settlement stipulation in an unfair labor practice case.[5] The pro-

4. The Union has intervened to urge enforcement of the Board's order. *See UAW Local 283* v. *Scofield*, 382 U. S. 205 (1965).

5. Banta relies heavily on terminology in the Board's Statements of Procedure, 29 C. F. R. §§ 101.9, 102.51, describing settlement stipulations which have not yet been formally approved by the Regional Director as "*offers* of settlement" or "*proposed* settlements", to which the Regional Director has thus far only "*tentatively* agreed." The company apparently attaches no corresponding significance to the complete absence of any such descriptive terms in the rules' references to stipulations which have been approved by the Regional Director or the General Counsel. See text of rules, note 3, *supra*.

The other rules cited by Banta establish that every formal settlement is subject to Board approval, *e.g.*, 29 C. F. R. §§ 101.9(b)(1), 101.9(c)(2), and provide that "[i]f the stipulation is not approved by the Board, the case will resume its status as before the execution." NLRB Casehandling Manual § 10174.

(Footnote 5 continued on next page.)

cedural rules cited by Banta merely emphasize that no agreement between the General Counsel and a party charged with unfair labor practices can become a final disposition of the charges until the Board itself, exercising its duty to determine whether the settlement both remedies the alleged unfair practices and serves the broader public policies of the Act, approves it. We find nothing in the rules which could lead Banta to reasonably believe that its execution of the stipulation could be repudiated at will after the General Counsel had accepted it in lieu of proceeding with the scheduled hearing.

We also reject Banta's characterization of the settlement stipulation as merely an offer by the company, which could be accepted only by the Board itself, and which, like any other contract offer, was revocable at any time prior to acceptance.

The Board held, and we agree, that this contention is based upon a misapprehension of the distinct roles of the Board and the General Counsel in the settlement process. The 1947 Taft-Hartley Amendments separated prosecutorial and adjudicatory

(Footnote 5 continued.)

Similarly, the language of the stipulation signed by Banta does not address withdrawal by a party. It provides that the "Stipulation is subject to the approval of the Board, and it shall be of no force and effect until the Board has granted such approval. Upon the Board's approval of the Stipulation, the Respondent will immediately comply with the provisions of the order." We believe that this provision, taken as a whole, simply states that the respondent has no obligation to comply with the substantive terms of the settlement unless and until it is approved by the Board.

Banta also cites prior Board cases, particularly *NLRB* v. *Decker*, 322 F. 2d 238 (8th Cir. 1965), and *NLRB* v. *Armstrong Tire & Rubber Co.*, 263 F. 2d 680 (5th Cir. 1959), in support of its contention that the Board itself has never considered a settlement agreement which it has not yet approved to be binding on the parties. These cases all involved backpay specifications, intended to constitute compliance with previous Board orders, which had been negotiated by Regional Office personnel and had not been approved by the General Counsel or the Board. Most importantly, the only relevant issue in these cases was whether the specification was binding *on the Board*. That issue is quite distinct from the question of whether a respondent may withdraw while Board action is pending.

functions under the Act by creating the office of General Counsel. *See I.L. G. W. U. Local 415-475* v. *NLRB*, 501 F. 2d 823 (D. C. Cir. 1974). The General Counsel was given "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board." 29 U. S. C. § 153(d). In exercising these duties, the General Counsel acts "independently of any direction, control or review by the Board," H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 37 (1947), and his decisions regarding whether to issue a complaint charging unfair labor practices, and the scope of any such complaint issued, are not reviewable by either the Board or the courts. *Wellington Mill Division, West Point Manufacturing Co.* v. *NLRB*, 330 F. 2d 579 (4th Cir. 1964). In formal settlement stipulations, the General Counsel exercises his statutory authority by agreeing not to litigate a charge, in return for the respondent's agreement to consent to a Board order, with judicial enforcement, requiring certain remedial action.

The settlement stipulation thus could be regarded as a binding argreement between the General Counsel and the respondent to settle, and to submit the stipulation to the Board for approval, *see* A. Corbin, Contracts § 61 (1952), but we do not believe that general contract law principles alone govern this issue. Although consent decrees are normally treated as contracts for purposes of construction, *United States* v. *Armor & Co.*, 402 U. S. 673 (1971),

> [c]onsent decrees and orders have attributes both of contracts and of judicial decrees or, in this case, administrative orders. While they are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation and must be approved by the court or administrative agency. [citations omitted.] Because of this dual character, consent decrees are treated as contracts for some purposes but not for others. *United States* v. *ITT Continental Baking Co.*, 420 U. S. 223, 236-37, n. 10 (1975). *See also United States* v. *Swift & Co.*, 286 U. S. 106 (1932).

Disposition of unfair labor practice charges involves not simply an adjustment of the rights of private parties, but also a broader public interest. *Cf. National Licorice Co. NLRB*, 309 U. S. 350, 362-64 (1940). Settlement agreements as an alternative to lengthy adjudication, allow both the Board and the respondent to "save . . . time, expense, and inevitable risk of litigation", *Armor, supra*, 402 U. S. at 681. They permit the prompt remedying of a greater number of unfair labor practices, as well as speedy resolution of crippling labor disputes. To permit a respondent unilaterally to withdraw from a formally executed settlement stipulation prior to Board approval would undermine the continued efficacy of the settlement process, and encourage its use as a dilatory tactic.

Similar policy considerations have led the courts to deny a party the right to withdraw unilaterally from Federal Trade Commission consent decrees, at a point where the agreement has been provisionally accepted by the Commission but is awaiting final agency approval following a public comment period. *Johnson Products Co.* v. *FTC*, 549 F. 2d 35 (7th Cir. 1977); *Ford Motor Co.* v. *FTC*, 547 F. 2d 954 (6th Cir. 1976). These courts concluded that the ultimate responsibility of the agency, to ensure that the public interest is served by a settlement, provides sufficient justification to permit the agency to withhold its final approval while denying the respondent a similar right to withdraw from the agreement. We agree, and believe that the rationale of these cases is fully applicable here, despite the differences in the two agencies' procedures.[6]

6. The regulations of both agencies fail to address the right of a party to withdraw from a settlement agreement. Regardless of the desirability of such a regulation, it is clear that the choice between proceeding by general rule or by individual order generally lies with the Board. *E.g., NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 290-95 (1974). And, "[a]lthough there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act", *id.* at 294, we find no such circumstances here, particularly since the Board's order does not represent a departure from a previously announced policy.

We therefore hold that a respondent in an unfair labor practices complaint, who joins with the General Counsel in executing a formal settlement stipulation to avoid litigation of the charge, has no right to withdraw unilaterally from that stipulation prior to its approval by the Board.

III.

Banta also argues that, even absent an absolute right to withdraw from a settlement stipulation, the circumstances of this particular case make the Board's rejection of the attempted withdrawal arbitrary and capricious. We need not decide whether either changed circumstances or unreasonable delay in Board action on a settlement may ever require that a party be permitted to withdraw, for we find no such compelling circumstances in this case.

Banta contends that a party to a formal settlement stipulation "may reasonably expect expeditious handling of the General Counsel and Board approvals required." We agree, and believe that, in this case, the approvals were made in a reasonably expeditious manner. The delay between Banta's execution of the stipulation and the General Counsel's approval was the result of the Union's vigorous objections to the terms of the agreement—objections which it had every right to make, and which the Regional Director and General Counsel were obligated to carefully consider. See note 3, *supra*. The Union's objections were not frivolous, as both the Regional Director and General Counsel acknowledged. Nevertheless, the Union's request for a hearing on these objections was denied, in favor of a more expeditious resolution of the complaint. We believe that, under the circumstances, a two month delay in the General Counsel's approval cannot be considered unreasonable,[7] nor should it have been unexpected by Banta.

7. Banta also complains that final approval by the Board was not forthcoming until almost one year after the company executed the stipulation. But it has not contested the Board's assertion that this delay resulted from Banta's attempts to withdraw from the settlement.

Further, neither the record nor Banta's arguments disclose any harm caused Banta by the delay which would justify its withdrawal. The only damage Banta ever complained of was due to the ongoing strike of its employees, a strike which had ended two weeks before Banta's attempted withdrawal from the settlement stipulation. The Union's October 8, 1977, letter to Banta demonstrates that, in ending the strike and returning to work, the Union was relying on the reinstatement rights guaranteed under the settlement agreement.[8] It was only after the strike had

8. The Union's letter to Banta reads as follows:

> We are writing to advise you of the following:
>
> 1. Local Union 32-B and Local Union 88-L, Graphic Arts International Union, AFL-CIO, CLC, have today signed the Settlement Stipulation previously entered into by the Company and the National Labor Relations Board [citations omitted].
>
> 2. You are hereby advised that the strike . . . has been ended and we make an unconditional offer on behalf of all members of Local Union 32-B and Local Union 88-L and all employees in the units represented by these locals to return immediately to work at the Banta Division. Since you told us that you will be able to advise us on Monday, October 10 as to how fast you can resume operations, we will expect to hear from you on that date as to when you want the employees to report for work.
>
> 3. The membership of Local Union 32-B and the membership of Local Union 88-L have today accepted the contract offer made by the Company on October 6 and 7, 1977, concerning the terms and conditions of their employment.
>
> 4. We do not agree with the Company's interpretation of the statutory rights of returning employees, as set forth in the Company's Preferential Reinstatement System. We will rely on the statutory rights of reinstatement as provided by the statute and the Settlement Stipulation described above, and, of course, we do not waive any of those rights.

Following correspondence as to the effect of the Union's objection to the company's Preferential Reinstatement System, Banta responded, on October 10, 1977, with a letter confirming the terms of the new contract. This letter reads, in relevant part:

> It is our understanding that while you have accepted our total offer, you have reserved the right to challenge the legality of all or portions of the Preferential Reinstatement System. This

(Footnote 8 continued on next page.)

ended, and the employees had returned in reliance on the settlement agreement's provisions for reinstatement, that the company announced its intention to withdraw from the agreement.

Banta's final argument[9] concerns the effect of *Banta II*, the litigation based on the Union's October 20, 1977, charge that the company's method of reinstating returning strikers constituted an unfair labor practice. The *Banta II* complaint characterizes the 1977 strike as an unfair labor practices strike, resulting from Banta's April 4, 1977, action in "unilaterally chang[ing] wages, hours of work and other terms and conditions of employment . . . at a time when negotiations between the parties were continuing and at a time when bargaining impasse had not occurred." The complaint then charges Banta with the following violations of Section 8(a)(3) and (1) of the Act:

> (a) On or about October 10, 1977, and thereafter, Respondent granted, and continues to grant, preferential reinstatement rights or preferential seniority rights to jobs and rates of pay to those employees who had abandoned the above-described strike and who offered to or did return to work at Respondent before the Charging Parties abandoned the strike against Respondent.

(Footnote 8 continued.)

> is, of course your right, and we do not construe your acceptance of our total offer as a waiver of any rights under the NLRA except to the extent such rights are waivable and have been waived by the language of the Agreement.

The company never gave the Union any indication that its expressed reliance on the settlement stipulation was misplaced.

9. In its argument before the Board, Banta also contended that its attempted withdrawal was motivated in part by concern that the Board's recent decision in *VanTran Electric Corp.*, 231 NLRB 169 (1977) *enf. denied*, 580 F. 2d 921 (7th Cir. 1978), could result in the settlement agreement becoming the basis for a finding of subsequent violations of the Act, without benefit of full litigation of such alleged violations. Banta briefly renews this argument here. We believe that the Board properly rejected the argument since, even assuming that a change in relevant law might justify withdrawal, VanTran did not represent such a change. *See Pride Refining, Inc.*, 224 NLRB 1353 (1976), *enf. denied*, 555 F. 2d 453 (5th Cir. 1977).

(b) On or about October 10, 1977, and thereafter, Respondent denied seniority and the benefits of seniority for purposes of job assignment and computation of rates of pay to those employees who had engaged in the strike against Respondent until abandoned by Charging Parties.

At the hearing on these charges, the General Counsel sought to introduce evidence that the company's April 4 action constituted an unlawful refusal to bargain and that the resulting strike was an unfair labor practices strike. The General Counsel stated that he "does not seek any remedial relief for the 8(a)(5) violation of April 4, 1977. Evidence of [this violation] will be used by General Counsel only as background to throw light on Respondent's conduct in granting superseniority to those employees who prematurely abandoned Unions' strike . . . [and] to properly analyze the rights of the six strikers discharged for alleged strike misconduct." The Administrative Law Judge presiding at the hearing refused to admit this evidence, ruling that "these matters have been disposed of by the Board's Decision and Order [enforcing the settlement stipulation] and the obligation imposed thereby." The Board reversed the ALJ, and ordered him to receive the evidence "for background purposes".

This Board ruling, according to Banta, results in full litigation of the same issues involved in the June 27, 1977, complaint—litigation of which the settlement stipulation was designed to avoid. Therefore, the company argues, the Board is abusing its discretion by attempting to enforce the company's obligations under the settlement while simultaneously depriving the company of one of its expected benefits from the agreement.

The record before us does not establish whether *Banta II* represents a full litigation of the issues purportedly resolved in the settlement stipulation, and we express no opinion on the propriety of the Board's actions in that litigation. The *Banta II* proceeding, which seeks a remedy only for post-strike violations of the Act, is not a substitute for the settlement agreement designed to remedy pre-strike violations. We believe that any

objections Banta may have to the scope of the *Banta II* litigation should be raised in that litigation.

Banta received significant immediate benefits from its execution of the settlement stipulation. The General Counsel indefinitely suspended the scheduled hearing, failed to seek the authorized injunctive relief, and rejected the Union's claim for continued cost-of-living adjustments. The Union members terminated their strike and returned to work. The General Counsel and the Union necessarily relied on the company's corollary future commitments—to restore the pre-existing contract terms, to post a remedial notice to its employees, and to recognize the status of its employees as unfair labor practice strikers. To permit a party to accept the benefits of a settlement agreement, and then withdraw from that agreement without complying with its corresponding obligations, would subvert the settlement process. We believe that the Board properly refused to allow this abuse of its procedures, and accordingly we enforce the Board's order.

ENFORCEMENT GRANTED.

ALBERT V. BRYAN, *Senior Circuit Judge*, dissenting:

With deference to my brothers, the proposed opinion fails to recognize that General Counsel, rather than Banta (the Company), abrogated the Settlement Stipulation (the contract) in substantial and material points, justifying Banta's disaffirmance and termination of the agreement.

The fact is that General Counsel—unintentionally, of course, but nonetheless actually—misled Banta into signing the contract by asserting the immediacy of its effectuation. On July 22, 1977, Banta, therefore, signed the contract, less than a month after the Regional Director filed the complaint. As submitted to the Company, the Stipulation declared that without any further notice the Company consented to the entry *"forthwith"* of an order by the Board requiring Banta to comply

with the terms of the agreement and preventing it from raising any defenses to the judicial enforcement of the order.

Obviously, *"forthwith"* denoted and connoted expedition. Since the Company had been embroiled in the throes of a strike for over three months, plainly, prompt resolution of the problem was the inducement of Banta's ready joinder in the contract. It was in this spirit that the Company signed before either the Union or, indeed, the General Counsel had done so. With Banta's signature secured, however, the spirit of expedition abruptly vanished due to the utter laxity of General Counsel, which prevented dispatch in completing the execution of the contract.

I.

After July 22, for two and a half months, General Counsel was inexplicably inactive in fulfilling his commitment to act "forthwith." Although termination of the walkout hung on the contract's approval, even the Regional Director did not sign the Stipulation until August 11. The next day, the paper was sent to General Counsel. Ignoring the urgency of Banta's circumstances, General Counsel deplorably did not approve the Stipulation for six weeks. During its two-month wait, the Company faithfully and regularly, but in vain, reminded General Counsel that the strike was still afoot and the lagging pace was creating grave problems. Indeed, prior to his approval, the Company had protested to General Counsel that further delays would require it to withdraw from the Stipulation.

The Union constantly opposed the Stipulation. General Counsel, on September 20, notified it that he had executed the Stipulation and had sent it to the Board, recommending approval. At the Union's request, he extended the time for filing objections with the Board until October 5. When this deadline was postponed to October 17, Banta forcefully, but hopelessly, complained saying:

> Because of the tremendous delays that have occurred already in the processing of this formal settlement which was initially signed by Banta Division in early July, any further delay would cause irreparable harm, especially since the strike which commenced on April 4 is still in progress. Banta Division therefore requests that the requested extension be denied and/or revoked and that the Board expeditiously act on the formal settlement agreement that has already been recommended and approved by both the Regional Director and the General Counsel.

Ultimately, October 8, the Union signed the Stipulation and notified Banta, simultaneously. The strike ended October 8. Banta at once accepted the strikers' unconditional offer to return to work and resumed its own operations immediately. On October 20, the Union filed new unfair labor practice charges against Banta. Five days later, October 25, 1977, in understandable exasperation, Banta advised the Board that "in light of the great delay in approving Settlement, . . ." it was withdrawing from the Stipulation "effective immediately."

Despite the hurt suffered by Banta, enduring a lengthy strike, aggravated by General Counsel's inordinate dallying, the majority suggests that no injury was done the Company. The majority refuses to impute the delay to General Counsel's tarrying, ascribing it rather to the Union's hostility toward the Stipulation. Even if that were so, it was hardly just for General Counsel to temporize with the Union at the expense of the Company. If the Stipulation could not be implemented "forthwith," as precisely indicated in the provision which engaged Banta's acceptance, then in justice General Counsel was bound to evince concern and take immediate steps for the Company's relief. This was but another unmet contract obligation of General Counsel, entitling Banta to withdraw.

Noteworthy here is the majority's observation that "[t]o permit a respondent unilaterally to withdraw from a formally executed settlement stipulation prior to Board approval would . . . encourage its use as a dilatory tactic." But how much more of

an inciting tactic is it to allow General Counsel to stymie a Settlement Stipulation by simply dawdling in the consummation of it.

II.

In considering whether the Company transgressed the Settlement Stipulation, it is, of course, acknowledged that the roles of General Counsel and the Board are distinct, the first prosecutorial, the latter adjudicatory. Nor, is it disputed that General Counsel, not the Board, was the party contracting with the Company.

Unquestionably, too, the Settlement Stipulation was the equivalent of a consent decree. Decision upon its continued vitality, breach and termination is governed by the law of contracts, and not contract law jointly with Federal labor statutes, as the majority suggests. The authorities speak as one on this theorem, even in instances such as that here, when an administrative agency offers the forum. Summing the precedents, the Court in *United States* v. *ITT Continental Baking Co.*, 420 U. S. 223, 236-37 (1975), stated:

> Thus, the basic import of [*United States* v.] *Armour* [*& Co.*, 402 U. S. 673 (1971)], [*United States* v.] *Atlantic Refining* [*Co.*, 360 U. S. 19 (1959)], and *Hughes* [v. *United States*, 342 U. S. 353 (1952)] is that, since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation. (Footnote omitted.)

With General Counsel defaulting in performance of a fundamental purpose and proviso in his contract by failing to act "forthwith," the Company was justified in disaffirming the Stipulation. "A breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty." Restatement of Contracts § 397 (1932).

The late Judge Parker enunciated for this court, in *Sylvania Industrial Corp.* v. *Lilienfield's Estate*, 132 F. 2d 887, 892 (4th Cir. 1943): "it is well settled that in proper cases *rescission may be granted for default in performance.*" (Accent added and citations omitted.) Moreover, in *Hogue* v. *Pellerin Laundry Machinery Sales Co., Inc.*, 353 F. 2d 772, 774 (8th Cir. 1965), it is noted that

> In Williston's language, "* * * rescission is imposed *in invitum* by the law at the option of the injured party, and it * * * in general is allowed * * * for any breach of contract of so material and substantial a nature as would constitute a defense to an action brought by the party in default for a refusal to proceed with the contract." Williston on Contracts (Rev. Ed.), § 1467. (Additional citation omitted.)

Further, in *United States* v. *Southern Construction Co., Inc.*, 293 F. 2d 493, 498 (6th Cir. 1961), it was stated: "Appellant relies upon the well-settled rule that under certain conditions a material breach of contract by one of the parties thereto confers upon the other party to the contract the right to rescind and abandon the contract. . . ."

Enforcement of the Board's order should be declined.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 78-1437

George Banta Co., Inc., Banta Division,
Petitioner,

versus

National Labor Relations Board,
Respondent,

Graphic Arts International Union, Local No. 382,
AFL-CIO-CLC,
R/ *Intervenor.*

ORDER

Upon consideration of the petition for rehearing and suggestion for rehearing en banc, and a request for a poll on the suggestion for rehearing en banc was made, but the poll failed for lack of majority support,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Hall with the concurrence of Judge MacKenzie. Judge Bryan dissents.

For the Court

/s/ William K. Slate, II
Clerk

Filed: September 11, 1979

APPENDIX C

236 NLRB No. 224 D—3982
Menasha, Wis.

UNITED STATES OF AMERICA
Before the National Labor Relations Board

George Banta Company, Inc., Banta Division, and Graphic Arts International Union, Local No. 88L, AFL-CIO-CLC,	Cases 30-CA-4033 and 30-CA-4121
and Graphic Arts International Union, Local No. 32B, AFL-CIO-CLC.	Cases 30-CA-4044 and 30-CA-4120

DECISION AND ORDER

On August 11, 1977, George Banta Company, Inc., Banta Division, herein called the Respondent, and the General Counsel of the National Labor Relations Board entered into a settlement stipulation over the objection of the Charging Unions, subject to approval of the Board, providing for the entry of a consent order by the Board and a consent judgment by any appropriate United States court of appeals. Subsequently, on October 8, 1977, Graphic Arts International Union, Local No. 88L, AFL-CIO-CLC, and Graphic Arts International Union, Local No. 32B, AFL-CIO-CLC, herein called Local 88L and Local 32B, respectively, and Charging Unions, collectively, entered into the settlement stipulation.[1] The parties waived all further and other

1. By letter dated August 5, 1977, to the Regional Director the Charging Unions filed objections to the settlement stipulation. Subsequently, the Acting Regional Director by letter dated August 12, 1977, advised that he had carefully considered all the objections and, notwithstanding the objections, he was forwarding the stipulation to

(Footnote continued on next page.)

procedure before the Board to which they may be entitled under the National Labor Relations Act, as amended, and the Rules and Regulations of the Board, and the Respondent waived its right to contest the entry of a consent judgment or to receive further notice of the application therefor.

Thereafter, by letter dated October 25, 1977, the Respondent sought to withdraw from that settlement because of the delay in approving the settlement stipulation and because of the new issues relative to the settlement raised by the 8(a)(3) charges filed in Case 30-CA-4396. By letter dated November 9, 1977, the Charging Unions opposed the Respondent's withdrawal request. By letter dated November 15, 1977, the Respondent filed an answer to the Charging Unions' opposition. On December 30, 1977, the General Counsel filed an opposition to the Respondent's withdrawal request, and, on January 16, 1978, the Respondent filed a memorandum in support of its withdrawal request.

The above-entitled proceeding is hereby transferred to and continued before the Board in Washington, D. C. All the documents mentioned above, including the settlement stipulation, are made a part of the record herein.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the basis of the aforesaid settlement stipulation and the entire record in the proceeding, the Board makes the following:

(Footnote continued from preceding page.)
the General Counsel for approval. By letter dated September 22, 1977, the General Counsel advised the Charging Unions that he was approving the stipulation and was submitting it to the Board. After the settlement stipulation had been submitted to the Board for approval, the Charging Unions, by letter dated October 8, 1977, submitted the signed stipulation which, in effect, withdrew their objections.

Rulings on Motion to Withdraw From Settlement Stipulation and on Approval of the Settlement Stipulation

The basic issue herein is whether a party which has executed with the General Counsel a formal settlement stipulation, requiring Board approval, has the right unilaterally to withdraw therefrom prior to Board approval.[2] The Respondent argues that it has a right to withdraw and that the Board should honor its withdrawal request. The General Counsel and the Charging Unions disagree, contending that the Respondent may not unilaterally withdraw and that the Board should proceed to pass upon the adequacy of the settlement stipulation. We agree with the General Counsel and the Charging Unions.

A review of the file and record herein, including the submissions of the parties, reveals that, in substance, there is no factual dispute giving rise to the legal issue herein. After the General Counsel, the Respondent, and the Charging Unions had approved and executed the settlement stipulation herein,[3] the Respondent, in a letter dated October 25, 1977, advised the Board that it was withdrawing from the settlement because of the great delay in approving the said stipulation and because new issues, relative to the settlement, were raised by the 8(a)(3) charges filed against it in Case 30-CA-4396.[4] In response to the Charg-

2. In pertinent part, the language of the settlement stipulation provides in par. 11 that "the Stipulation is subject to the approval of the Board, and shall be of no force and effect until the Board has granted such approval. Upon the Board's approval of the Stipulation, the Respondent will immediately comply with the provisions of the order . . . ."

3. Originally, the Charging Unions had objected to the settlement stipulation, but the General Counsel had overruled the objections and forwarded the settlement stipulation to the Board with his recommendation for approval on September 22, 1977. The Charging Unions executed the settlement stipulation on October 8, 1977.

4. In support of this latter contention, the Respondent, in its letter of November 10, 1977, to the General Counsel, stated that in view of the Board's recent decision in *Vantran Electric Corporation*, 231 NLRB No. 169 (1977), the settlement agreement might be used as a basis for a finding of an 8(a)(3) violation without the Respondent being afforded the opportunity to fully litigate the 8(a)(3) issue.

ing Unions' letter to the Board opposing withdrawal, the Respondent, in its letter of November 15, 1977, stated that, at the time it signed the settlement stipulation early in July 1977, it was advised that the agreement would not be binding until it was approved by the Regional Director, the General Counsel, *and* the Board. In addition, the Respondent cited the statement from the Board's *Decker* decision that "it is well settled that only formal approval by the Board will make a settlement binding upon the parties."[5] Accordingly, it contended that the Respondent's signature on the settlement stipulation constituted, at best, an offer of settlement which had to be approved and accepted by the Board, a necessary party, in order to be binding and that its withdrawal from the settlement stipulation prior to Board approval must be permitted. In its memorandum in support of withdrawal, the Respondent further argues that the *Decker* statement is directly relevant to the withdrawal issue herein, and that court precedents in Federal Trade Commission (FTC) cases cited by the General Counsel, discussed *infra,* are distinguishable. In those cases, the FTC itself had originally accepted the consent order settlement before it refused to permit unilateral withdrawal during the 60-day public comment period which it had reserved for any reconsideration, while in the situation herein it is admitted that only the General Counsel, but not the Board, had accepted and approved the settlement stipulation.

In his opposition to the Respondent's attempt to withdraw unilaterally from the settlement stipulation approved by him, the General Counsel asserts that there are no Board or court

5. The Respondent noted that this statement which was taken from the Board's Decision in *Loren A. Decker d/b/a Decker Truck Lines,* 139 NLRB 65, 66 (1962), was cited with approval by the Eighth Circuit in its decision enforcing the Board's Order in 322 F.2d 238, 242 (1963).

precedents directly in point[6] and therefore he relies upon two United States court of appeals decisions which arose in the context of the FTC's consent decree procedures which, like the Board's rules, are silent as to whether unilateral withdrawal prior to FTC's final approval is permitted.[7] Noting that the FTC, unlike a private litigant, must act in the public interest, the Seventh Circuit, in *Johnson,* agreed with the FTC's position that permitting unilateral withdrawals prior to final approval would pose a serious risk of undermining the continued efficacy of its consent order procedures as an alternative to lengthy adjudication. The General Counsel argues that, since similar policy considerations underlie the Board's settlement procedures, the Board must act in the public interest and must refuse to permit, prior to its final approval, unilateral withdrawal by the Respondent from the settlement stipulation made with the General Counsel in order to prevent the undermining of the continued efficacy of its settlement procedures and the use of such procedures as a dilatory factor.

The General Counsel also contends that the language of paragraph 11 of the settlement stipulation does not establish the Respondent's right unilaterally to withdraw from its settlement stipulation made with him, pending Board approval. He contends that the settlement stipulation imposes two commitments on the Respondent. First, the Respondent commits itself to take certain remedial action *if and when* the Board approves the settlement

6. We agree with the General Counsel that the Respondent's reliance on the Board's statement in *Decker* is misplaced. *Decker* involved compliance with the Board's backpay order and the statement, cited by the Eighth Circuit without comment, was *dictum* as the Board had found there had been no settlement with the Regional Office as to compliance. Further, the "so-called backpay settlements" with the Region were merely preliminary negotiations, not binding on the Board, while here the issue is the right of the Respondent to withdraw from its agreement with the General Counsel prior to Board approval.

7. *Johnson Products Company* v. *F. T. C.,* 549 F. 2d 35 (C. A. 7, 1976); also *Ford Motor Company* v. *F. T. C.,* 547 F. 2d 954 (C. A. 6, 1976).

stipulation and the General Counsel agrees that the remedial action when taken would be considered a full remedy for the alleged unfair labor practices. Paragraph 11 addresses itself to that commitment. The other commitment is an implied one to the effect that the first commitment will remain outstanding until the Board acts, while the General Counsel promises not to institute litigation while the matter is pending before the Board.

The basic disagreement between the Respondent and the General Counsel, in effect, comes down to a disagreement as to the identity of the parties to the settlement stipulation which, by its terms, is subject to approval of the Board.[8] The Respondent argues that, because the settlement of the case is not binding on it until approval by the Board, the Board is a necessary party whose approval is required before there can be binding agreement to settle. Therefore, continues the Respondent, its offer to settle can be withdrawn any time prior to Board acceptance of the offer as signified by Board approval of the settlement stipulation and this is the situation herein. The General Counsel, however, contends that, to the extent that contract law of offer and acceptance governs the situation herein, there has been an effective agreement between him and the Respondent requiring the Respondent to maintain and continue outstanding its express commitment to take certain remedial action pending Board approval. The General Counsel's view would avoid the risk of undermining the efficacy of settlement procedures and is more in accord with the factual, statutory, and policy considerations bearing on this question than is the view of the Respondent.

The actual parties to the settlement stipulation submitted herein to the Board for approval are the Respondent and the General Counsel, through the Regional Director as agent for the

8. A charging party may be a necessary party to the extent that it is entitled to be heard upon its objections to a settlement stipulation between the General Counsel and a respondent. Here the Charging Unions have joined in the stipulation.

General Counsel but subject to approval by the General Counsel himself. Thus, if contract law of offer and acceptance applies, as the Respondent argues, the Respondent's offer to settle, having been accepted by the General Counsel, results in a binding agreement to settle and to submit the settlement stipulation to the Board for approval, with Board approval triggering the duties required of the parties to the settlement stipulation.

This view as to the identity of the parties to the settlement stipulation accords with the provisions of Section 3(d) of the Act which gives the General Counsel "final authority, on behalf of the Board . . . in respect of the prosecution of such complaints. . . ." In formal settlement stipulations, he exercises that statutory authority by agreeing not to litigate the matter in consideration for the Respondent's agreement to consent to the entry of a Board Order and a consent court decree requiring the Respondent to take certain remedial action. Because of this final authority to prosecute, the General Counsel is a necessary party to a settlement agreement. Therefore, viewing the General Counsel and the Respondent as the parties to whom the contract law of offer and acceptance applies enables the General Counsel to exercise his statutory authority as to how unfair labor practice complaints are to be prosecuted and affords the Respondent, who need not have offered to settle, its due process with respect to such prosecution.

Unlike the General Counsel, the Board's statutory function is judicial rather than prosecutory in nature and is to decide those issues raised and litigated by the General Counsel in his prosecution of the unfair labor practice complaints. The Board's adjudicatory function is exercised herein by its approval or disapproval of the settlement stipulation which is a substitute for litigation of the unfair labor practice issues. To construe the language of the settlement stipulation as making the Board a necessary party whose approval is required *before* there can be a binding agreement between the Respondent and General Counsel on unfair labor practice issues would not only intrude the

Board into the General Counsel's statutory role of exercising his final and exclusive authority in respect of the prosecution of complaints under Section 3(d) of the Act but would, in addition, join the prosecutory and adjudicatory functions in the Board contrary to the congressional mandate that these functions be separated in the manner provided in the Act.[9]

Finally, policy considerations militate against granting respondents the right to withdraw from formal settlement stipulations executed with the General Counsel pending Board approval. Such a right would undermine the continued efficacy of the settlement process which, as an alternative to lengthy adjudication, allows the Board as well as respondents and charging parties to save time, expense, and the inevitable risk of litigation. In *Johnson, supra,* the Seventh Circuit alluded to such considerations which it found justified the refusal to permit a respondent to withdraw from a consent order prior to FTC's final approval. A similar approach is warranted herein where the situation is basically analogous to that in *Johnson.* Thus, the FTC's acceptance of the consent order agreed to by the respondent is equivalent to the General Counsel's acceptance and approval of the Respondent's offer to finally settle a case, while the FTC's reservation of the right to withdraw its original acceptance after hearing public comment is analogous to the requirement that the settlement stipulation shall be subject to Board approval before it becomes binding. As the FTC itself is both prosecutor and adjudicator, it therefore had to act in both capacities. On the other hand, under the Act, the General Counsel is the prosecutor and the Board is the adjudicator and each must and does act separately. As in *Johnson* where the court agreed with the FTC that the

9. The language of par. 11 of the settlement stipulation providing for Board approval and requiring the Respondent to comply with the settlement stipulation upon such approval is consistent with and reflects the separate statutory authority of the General Counsel and the Board and their separate individual responsibilities. To construe the language otherwise would combine and confuse the separate functions of the General Counsel and Board.

respondent had no right unilaterally to withdraw from the consent agreement prior to the FTC's action, so, too, here the Respondent, having agreed to the settlement stipulation herein with the General Counsel, has no right unilaterally to withdraw therefrom pending Board action but must await the Board's determination to approve or disapprove the settlement stipulation. Accordingly, the Respondent's request of October 25, 1977, unilaterally to withdraw from the settlement stipulation herein is denied.[10]

Having considered the entire matter and being of the opinion that the settlement stipulation fully remedies the allegations of the unfair labor practice complaint herein, providing as it does for the entry of a Board Order and a consent judgment in the appropriate United States court of appeals, we are of the opinion that it would effectuate the policies of the Act to approve the settlement stipulation. Accordingly, the settlement stipulation is approved and, pursuant to the provisions thereof, we shall make the appropriate findings of fact and enter the appropriate Order.

10. By letter dated March 1, 1978, the Respondent requested that the Board take official notice of the February 9, 1978, letter from the General Counsel's Freedom of Information Officer, wherein he stated that a charged party's withdrawal from a settlement agreement would be "the same as if the party had refused to comply with the settlement agreement, and the agreement will be set aside and formal proceedings instituted." Accordingly, the Respondent argued that this statement is dispositive of the question before the Board and that the settlement stipulation herein is not binding on the Respondent which withdrew therefrom prior to Board approval. However, the Respondent's argument is misplaced. It is clear from the FOI Officer's reference to sec. 10154 of the Casehandling Manual and a reading of that provision that he was referring to informal settlements where the complaint had not been issued or had been withdrawn and where, following noncompliance, formal unfair labor practice proceedings are then instituted. Obviously, it would have no applicability to formal Board settlements where, in the event of noncompliance, a court judgment would be entered enforcing the Board's Order.

Findings of Fact.

I. The Business of the Respondent.

The Respondent, a Wisconsin corporation, is engaged in the printing and bookbinding business from its facilities located at Menasha, Wisconsin.

During the past calendar year, a representative period, in the course and conduct of its business, Respondent sold and shipped goods and products valued in excess of $50,000 to customers located directly outside the State of Wisconsin, and purchased and received goods valued in excess of $50,000 from sources located directly outside the State of Wisconsin.

The Respondent admits, and we find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved.

Graphic Arts International Union, Local No. 88L, AFL-CIO-CLC, and Graphic Arts International Union, Local No. 32B, AFL-CIO-CLC, are labor organizations within the meaning of Section 2(5) of the Act. Local 88L has been at all times since about 1959 the recognized statutory representative of all employees in the appropriate unit (a) below for the purposes of collective bargaining within the meaning of Section 9(a) of the Act. Local 32B has been at all times since about 1951 the recognized statutory representative of all employees in the appropriate unit (b) below for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

(a) All employees engaged in lithography, offset, photoengraving, intaglio and gravure operations at the Respondent's facilities, but excluding office and clerical employees and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

(b) All bindery and finishing operations employees employed at the Respondent's Menasha and Midway, Wisconsin, plants, but excluding office and clerical employees and supervisors, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

ORDER.

Upon the basis of the above findings of fact, the settlement stipulation, and the entire record in the proceeding, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

The Respondent, George Banta Company, Inc., Banta Division, Midway, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing or failing to bargain in good faith with Graphic Arts International Union, Local No. 88L, AFL-CIO-CLC, as the exclusive collective-bargaining representative of its lithography, offset, photoengraving, intaglio and gravure operations employees, but excluding office and clerical employees and supervisors as defined in the Act, and all other employees.

(b) Refusing or failing to bargain in good faith with Graphic Arts International Union, Local No. 32B, AFL-CIO-CLC, as the exclusive collective-bargaining representative of its bindery and finishing operations employees at its Midway and Menasha, Wisconsin, plants, but excluding office and clerical employees and supervisors.

(c) Unilaterally changing wages, hours of work, and other terms and conditions of employment during negotiations with the above-named Unions unless a valid impasse is reached.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which we find will effectuate the policies of the Act:

(a) Revoke implementation of the following terms of its "last contract offer" of April 4, 1977: elimination of the percentage contribution to employees' insurance carrier, increasing the workweek from 35 to 38 hours, and insistence on its proposed contract terms.

(b) Revert to the wages, hours of work, and other terms and conditions of employment which existed prior thereto, but excluding cost-of-living adjustments, arbitration procedure, and union security, and maintain such wages, hours of work, and other terms and conditions of employment, subject to collective bargaining thereafter, pursuant to paragraph (c) below.

(c) Upon request, bargain collectively with Graphic Arts International Union, Local No. 88L, AFL-CIO-CLC, and with Graphic Arts International Union, Local No. 32B, AFL-CIO-CLC, as the exclusive representative of employees in the respective units with respect to wages, hours of work, and other terms and conditions of employment, and, if understandings are reached, embody such understandings in signed agreements.

(d) Upon the making of unconditional offers to return to work by striking employees, who were on strike on or after April 4, 1977, made within 60 calendar days from the posting of the Notice to Employees, offer immediate and full reinstatement to their former or substantially equivalent positions, if such jobs are available, without prejudice to their seniority or other rights and privileges unless they have been, or are, lawfully discharged, dismissing any persons, if necessary, hired by the Respondent between April 4, 1977, and the 61st calendar day after the posting of the Notice to Employees. If insufficient jobs are available for those employees, or if they make unconditional offers to return to work and they have been permanently replaced after the 60th day following the posting of the Notice to Employees, and absent any findings of new unfair labor practices which cause prolongation of the strike, place such em-

ployees on a preferential hiring list in accordance with seniority, and offer employment to them before other persons are hired.

(e) Post at its Midway plant and at its Menasha plant, in Menasha, Wisconsin, copies of the attached Notice to Employees. Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by the Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., July 14, 1978.

John H. Fanning, Chairman
Howard Jenkins, Jr., Member
Betty Southard Murphy, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board

An Agency of the United States Government

Pursuant to a stipulation providing for a consent judgment of any appropriate United States Court of Appeals, we hereby notify our employees that:

After an investigation the National Labor Relations Board has found that we have violated employee rights under the National Labor Relations Act, as amended. In order to remedy these violations, we have agreed to refrain from such conduct in the future, to post this notice, and to comply with its provisions.

The Act gives all employees these rights:

To engage in self-organization

To form, join, or assist labor organizations

To bargain collectively through representatives of their own choosing

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all of these things.

WE WILL NOT do anything that interferes with, restrains, or coerces you with respect to these rights.

WE WILL NOT refuse or fail to bargain in good faith with Graphic Arts International Union, Local No. 88L, AFL-CIO-CLC, as the exclusive collective-bargaining representative of our lithography, offset, photoengraving, intaglio, and gravure operations employees, but excluding office and clerical employees and supervisors as defined in the Act, and all other employees.

WE WILL NOT refuse or fail to bargain in good faith with Graphic Arts International Union, Local No. 32B, AFL-CIO-CLC, as the exclusive collective-bargaining representative of our bindery and finishing operations employees at our Midway and Menasha plants, but excluding office and clerical employees and supervisors.

WE WILL NOT unilaterally change wages, hours of work, and other terms and conditions of employment during negotiations with the above-named Unions unless a valid impasse is reached between us.

WE WILL NOT in any like or related manner interfer with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the National Labor Relations Act.

WE WILL revoke implementation of the following terms of our "last contract offer" of April 4, 1977: our elimination of the percentage contribution to employees' insurance carriers, our increasing the workweek from 35 to 38 hours, and our insistence on our proposed contract term.

WE WILL revert to the wages, hours of work, and other terms and conditions of employment which existed prior thereto, but excluding cost-of-living adjustments, arbitration procedure, and union security, and maintain such wages, hours of work, and other terms and conditions of employment, subject to collective bargaining thereafter, with the Unions as indicated below.

WE WILL, upon request, bargain with Graphic Arts International Union, Local No. 88L, AFL-CIO-CLC, and with Graphic Arts International Union, Local No. 32B, AFL-CIO-CLC, as the exclusive representatives of employees in the respective units with respect to wages, hours of work, and other terms and conditions of employment, and, if understandings are reached, embody such understandings in signed agreements.

WE WILL, upon the making of unconditional offers to return to work which are made within 60 calendar days from the posting of this notice by striking employees, who were on strike on or after April 4, 1977, offer immediate and full reinstatement to their former or substantially equivalent positions, if such jobs are available, without prejudice to their seniority or other rights and privileges, unles they have been (or are) lawfully discharged, dismissing any persons, if necessary, hired by us between April 4, 1977, and the 61st calendar day after the posting of this notice. If insufficient jobs are available for employees who make such offers, or if unconditional offers are made by employees who have been replaced after the 60th day following the posting of this notice, and if there are no other findings of unfair labor practices, which cause prolongation of the strike, WE WILL place such employees on a preferential hiring list in accordance with seniority and offer employment to them before any other persons are hired.

GEORGE BANTA COMPANY, INC.,
BANTA DIVISION
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Commerce Building—Suite 230, 744 North Fourth Street, Milwaukee, Wisconsin 53203, Telephone 414-224-3866.

APPENDIX D

Relevant portions of the Administrative Procedure Act, 5 U. S. C. § 500 et seq.

Sec. 706. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX E

Relevant portions of National Labor Relations Board Rules and Regulations, Statements of Procedure, and Casehandling Manual—Unfair Labor Practice Proceedings.

NATIONAL LABOR RELATIONS BOARD

Rules and Regulations
and
Statements of Procedure
Series 8, as Amended

* * * * *

Sec. 102.51 *Settlement or adjustment of issues.*—At any stage of a proceeding prior to hearing, where time, the nature of the proceeding, and the public interest permit, all interested parties shall have opportunity to submit to the regional director, with whom the charge was filed, for consideration, facts, arguments, offers of settlement, or proposals of adjustment.

* * * * *

Sec. 101.9 *Settlement after issuance of complaint.*—(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

(b)(1) After the issuance of a complaint, the agency favors a formal settlement agreement, which is subject to the approval of the Board in Washington, D. C. In such an agreement, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the settlement. Ordinarily the formal settlement agreement also contains the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order.

(2) In some cases, however, the regional director, pursuant to his authority to withdraw the complaint before the hearing (section 102.18), may conclude that an informal settlement agreement of the type described in section 101.7 is appropriate. Such agreement is not subject to approval by the Board and does not provide for a Board order. It provides for the withdrawal of the complaint.

(c)(1) If after issuance of complaint but before opening of the hearing, the charging party will not join in a settlement tentatively agreed upon by the regional director, the respondent, and any other parties whose consent may be required, the regional director serves a copy of the proposed settlement agreement on the charging party with a brief written statement of the reasons for proposing its approval. Within 5 days after service of these documents, the charging party may file with the regional director a written statement of any objections to the proposed settlement. Such objections will be considered by the regional director in determining whether to approve the proposed settlement. If the settlement is approved by the regional director notwithstanding the objections, the charging party is so informed and provided a brief written statement of the reasons for the approval.

(2) If the settlement agreement approved by the regional director is a formal one, providing for the entry of a Board order, the settlement agreement together with the charging party's

objections and the regional director's written statements, are submitted to Washington, D. C., where they are reviewed by the general counsel. If the general counsel decides to approve the settlement agreement, he shall so inform the charging party and submit the agreement and accompanying documents to the Board, upon whose approval the settlement is contingent. Within 7 days after service of notice of submission of the settlement agreement to the Board, the charging party may file with the Board in Washington, D. C., a further statement in support of his objections to the settlement agreement.

(2) If the settlement agreement approved by the regional director is an informal one, providing for the withdrawal of the complaint, the charging party may appeal the regional director's action to the general counsel, as provided in section 102.19 of the rules and regulations.

(d)(1) If the settlement occurs after the opening of the hearing and before issuance of the administrative law judge's decision and there is an all-party informal settlement, the request for withdrawal of the complaint must be submitted to the administrative law judge for his approval. If the all-party settlement is a formal one, final approval must come from the Board. If any party will not join in the settlement agreed to by the other parties, the administrative law judge will give such party an opportunity to state on the record or in writing its reasons for opposing the settlement.

(2) If the administrative law judge decides to accept or reject the proposed settlement, any party aggrieved by such ruling may ask for leave to appeal to the Board as provided in section 102.26.

(e)(1) In the event the respondent fails to comply with the terms of a settlement stipulation, upon which a Board order and court decree are based, the Board may petition the court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a stipulation settlement providing solely for the entry of a Board order, the Board may petition the court

for enforcement of its order, pursuant to section 10 of the National Labor Relations Act.

(2) In the event the respondent fails to comply with the terms of an informal settlement agreement, the regional director may set the agreement aside and institute further proceedings.

* * * * *

NATIONAL LABOR RELATION BOARD

CASEHANDLING MANUAL

(Part One)

UNFAIR LABOR PRACTICE PROCEEDINGS

* * * * *

10140 *Types of Settlement*

10140.1 *Generally:* . . .

* * * * *

A settlement agreement, as the term is used here, is an agreement on which the Board has placed its imprimatur, with which the Board will police compliance, and on the basis of which, when complied with, the parties are notified that the matter has been closed (10150).

Settlement agreements consist of *informal* (10146-10156) and *formal* agreements (10164-10174).

* * * * *

10146-10156 *Informal Settlements:*

10146 *Nature of Informal Settlements:*

10146.1

In General: An informal settlement agreement is a simple written agreement, providing that the charged party will take certain action in remedy of his unfair labor practices. It requires the approval of the Regional Director but does not provide for a Board order or court decree. . . .

* * * * *

10146.2

After Complaint: Informal settlement agreements may be used after complaint has issued, provided that past history and future probabilities warrant its use. . . .

* * * * *

10146.4

Disposition of Allegations: It is preferred practice that the charge (or last amendment thereto) be amended to conform to the settlement; otherwise, the parties should be made to understand that the settlement agreement, together with any other actions which may have been taken in the case, disposes of all allegations of the (last amended) charge. If an *informal bilateral settlement* does not automatically dispose of all violations alleged in the charge, insert a sentence to the effect that "this settlement disposes of all unfair labor practices alleged in the charge."

10148

Informal Settlement After Issuance of Complaint

* * * * *

10148.2

Agreement Executed Prior to Opening of Hearing: Regional Directors have the authority to approve informal settlement agreements executed at any time prior to the opening of the hearing and, upon such approval, to withdraw the complaint. . . .

* * * * *

10150

Effectuation, Performance, and Closing of All Party Settlement Case

10150.1

Action Upon Approval of Agreement: Upon approval by the Regional Director of a settlement agreement in which the charging party joins, the parties through their attorneys or representatives should be informed of the fact and the charged party through his attorney or representative should be requested immediately to take the action called for in the agreement. He should be furnished with sufficient copies of the notice and be given whatever other assistance the Region can render toward carrying out the agreement.

* * * * *

10152

Effectuation, Performance, and Closing of "Unilateral" Settlement Case

10152.1

Charge Found Meritorious: In cases where the Regional Director finds the charge to be meritorious, the procedure is as follows:

a. *Notification to Charging Party:* When a charging party refuses to enter into a proposed settlement, either formal or informal, his attorney or representative of record, if any, should be sent a letter with a copy to the charging party setting forth briefly the reasons for proposing its approval.

In particular, reasons for any departure from standard Board remedy practice should be given. Reasons should be formed as an expression of judgment, rather than assertion of fact or law.

The charging party should also be informed that any objections to the settlement, together with supporting argument, should be submitted in writing to the Region within 5 days after service of the letter.

If the settlement is to be approved, notwithstanding the objections (or at the end of the 5-day period if objections are not submitted), the charging party should

be so informed and given a brief statement of the reasons for doing so.

* * * * *

10152.3

Appeal (Request for Review): If an appeal is filed, the memo with which the file is transmitted to Washington should "flag" the appeal as one which is holding up effectuation of a unilateral settlement. The appeal will be given expedited treatment in Washington.

10152.4

Compliance: After the appeal period has passed, if no appeal has been filed, the Regional Director instructs the charged party to take the action called for in the agreement. If an appeal has been filed, the instruction is not given unless and until the General Counsel has upheld the action of the Regional Director. In either case, the policing of compliance and closing of the case should be in accord with the procedures described in 10150.2 and 10150.3.

If the charged party commenced performance of the terms of the agreement *prior to* being so instructed by the Regional Director, the performance eventually required shall be only to the extent not already performed.

10154

Noncompliance: In the event that, in the opinion of the Regional Director, the provisions of the agreement have not or will not be carried out, he will notify the parties of this fact and inform them that, despite the execution of the agreement, such action as appears necessary to effectuate the purposes of the Act will be taken. Thereafter, appropriate action, as if there had been no settlement agreement, will be taken; complaint will be issued, or reissued, and pressed on its merits and not on the basis of noncompliance with the agreement.

10156

Reversal by General Counsel: If, on an appeal of a dismissal or refusal to press complaint based on a unilateral settlement agreement, the action of the Regional Director is reversed, the case will revert to its status before any agreement was executed and appropriate action will be taken.

10164-10174 *Formal Settlements*

* * * * *

10164.6

A. *Obtaining Approval of Formal Settlement Before Hearing Opens:* A formal settlement requires approval by the General Counsel and by the Board. The settlement should be submitted to the Division of Operations Management with a transmittal memorandum giving all details pertinent to the settlement, *especially calling attention to and explaining any deviations from established law or any unusual facets* (10172.5). If there is no provision for a court judgment, the reason should be given. The record in the case (10166.5) must be stapled or securely fastened to the transmittal memorandum.

* * * * *

10164.7

Parties: Normally, the charging party is a party to the formal settlement agreement. However, an agreement which fully remedies all unfair labor practices should be accepted—subject of course to approval by the General Counsel and the Board—whether or not the charging party acquiesces. (Cf. *Marine Engineers' Beneficial Association* v. *N. L. R. B.*, 202 F. 2d 546 (C. A. 3); *Leeds & Northrup Company* v. *N. L. R. B.*, 357 F. 2d 527 (C. A. 3).)

* * * * *

10166.2

Overall Content of Stipulation: In addition to its remedial provisions, the stipulation contains a recital of jurisdictional facts; a waiver of formal hearing and further proceedings; an enumeration of the documents and pleadings which constitute the entire record; a recital of facts which are not apparent from the pleadings; an express consent to the entry by the Board of an order in conformity with the stipulation without further notice; where appropriate, an express consent to the entry by an appropriate United States Court of Appeals of a judgment enforcing the order; a statement that the entire agreement between the parties is contained in the stipulation; and a statement that the settlement is subject to the approval of the Board.

* * * * *

10168

Pattern 60, Settlement Stipulation in CA Cases:

* * * * *

12. This stipulation, together with the other documents constituting the record as described in paragraph 5 hereof, shall be filed with the Board. The stipulation is subject to the approval of the Board, and it shall be of no force and effect until the Board has granted such approval. Upon the Board's approval of the stipulation, the Respondent will immediately comply with the provisions of the order as set forth in paragraph 9 hereof.

* * * * *

10172.3

Final Approval: The Board agent negotiating the settlement should make clear that the settlement not only is subject to approval by the Board, but also is subject to approval by the General Counsel's office in Washington. Parties should be given copies of the stipulation at the time the Regional Attorney signs it and at that time advised that they will be notified by the

Regional Office of approval of the General Counsel, and the date thereof, so that they may accordingly conform their copies.

* * * * *

10174

Nonapproval by Board: If the stipulation is *not* approved by the Board, the case will resume its status as before the execution. An answer filed or withdrawn in connection with the settlement may by stipulation of the parties be withdrawn or refiled, respectively. Hearing dates should be reset. Or, of course, the stipulation may be revised for resubmission to the Board.